



Commonwealth of Massachusetts

State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-98-4*

FACTS:

You were the Secretary-Treasurer of the Massachusetts Turnpike Authority ("MTA"), whose governing body is the Massachusetts Turnpike Authority Board ("MTA Board"). You have retired from that position and receive a retirement allowance through the Massachusetts Turnpike Authority Employees' Retirement System ("MTAERS" or "System"), which is administered by the MTAERS Board. The MTAERS members are all of the MTA's current employees who have active accounts with the System and former MTA employees who have accounts with the System but are not currently contributing, including retirees. There are currently approximately 2,000 MTAERS members. The MTAERS members elected you to serve as a member of the 5-member MTAERS Board, established and composed as described below.

Chapter 32 of the General Laws ("Chapter 32"), originally adopted shortly after World War II, established a uniform framework providing retirement systems and pension rights and benefits for public employees in the Commonwealth. The MTAERS Board was created pursuant to G.L. c. 32, §20, Subdivision 4 ½ ("MTAERS Statute"), which provides that the Board comprise five members,^{1/} as follows: the first member is the MTA's chief financial officer who is to serve ex officio; the second member is appointed by the MTA's "appointing authority," which you have informed us is the MTA's Board of Directors; the third and fourth members are "elected by the members in or retired from service of such [retirement] system from among their number"; and the fifth member (who may not be an employee, retiree or official of the governmental unit) is appointed by the other four.^{2/} The MTAERS Board currently has a support staff consisting of a secretary to the Board, a bookkeeper and a clerk/typist, all of whom are on the MTA's payroll and receive MTA benefits. The MTA's general counsel is the MTAERS Board's legal adviser. G.L. c. 32, § 20, Subdivision 4 ½(e).

Last year, the Legislature revised the method for granting cost of living adjustments ("COLAs") to retiree-members (and such persons' beneficiaries, if any)^{3/} of many of the public employee retirement systems governed by Chapter 32. This was done through its enactment of Chapter 17 of the Acts of 1997 ("Chapter 17"), entitled "AN ACT relative to the annual cost of living adjustments for retirees," which was signed into law on June 6, 1997.^{4/} Prior to 1976, pursuant to Chapter 32, §102, COLA benefits were provided as a matter of law without further action by the Legislature or retirement boards. In 1976, the COLA mechanism was modified to require annual approval of any such COLA increase through legislation passed by the Legislature and approved by the Governor.^{5/} St. 1976, c. 126, §1, amending Chapter 32, §102. With the enactment of Chapter 17, the Legislature ended its and the Governor's roles in determining whether COLAs are to be granted to retiree-members and their beneficiaries for most of the public employee retirement systems subject to Chapter 32 by creating a statutory scheme that may, at the option of the subject retirement system, be accepted and effected.

As applied to the MTAERS, COLAs may be effected as provided by Chapter 17, §8, codified as G.L. c. 32, § 103 ("New COLA Statute").^{6/}

Pursuant to the New COLA Statute, the MTAERS Board (by majority vote) may consider and vote upon whether or not to accept the COLA process ("COLA Process") prescribed by the New COLA Statute ("COLA Acceptance Decision").^{7/} If the MTAERS Board accepts the COLA Process and if the MTA Board thereafter approves such acceptance, that 2-step action will irrevocably effect the COLA Process for the MTAERS. If the COLA Process is so effected, then thereafter the MTAERS Board must vote on whether or not to adopt the cost of living adjustment ("Annual COLA Decision") "recommended" each year in an annual report required to be made by PERAC. The MTAERS Board may elect not to pay PERAC's recommended COLA Adjustments if "the Board determines that the cost of living adjustment recommended by said report shall substantially impair the funding schedule of said system" and files with PERAC a "notice of its election not to pay and an analysis of the impact on the funding schedule."

If the MTAERS Board were to accept the COLA Process and the MTA Board were to approve such acceptance and, thereafter, the MTAERS Board were to approve an annual COLA, the retirement benefits of MTAERS retiree-members, including you, and their beneficiaries would be increased. Currently, there are approximately 650 MTAERS retiree-members and beneficiaries receiving retirement benefits.

QUESTION:

May you participate in the MTAERS Board's consideration of and vote on the COLA Acceptance Decision and, if accepted, subsequent Annual COLA Decisions?^{8/}

ANSWER:

Yes.

DISCUSSION:

The MTAERS Board is a state agency;^{9/} as a member of the MTAERS Board, you are a state employee^{10/} within the meaning of G.L. c. 268A, the conflict of interest law. As such, Section 6 of G.L. c. 268A is relevant to your request.

A. Section 6

G.L. c. 268A, §6 prohibits a state employee from participating in any particular matter^{11/} in which to his knowledge he, his immediate family or partner, a business organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest. "Participation"^{12/} includes both formal and informal lobbying of colleagues, reviewing and discussing, giving advice and making recommendations, as well as deciding and voting on particular matters. *EC-COI-92-30; 90-5; 87-25; Graham v. McGrail*, 370 Mass. 133, 137-138 (1976). The financial interest may be of any size and may be either positive or negative; it must, however, be direct and immediate or reasonably foreseeable in order to implicate §6. See *EC-COI-93-20; 84-96; 84-98* (describing these principles under §19, the municipal counterpart of §6). Whether a financial interest is reasonably foreseeable must be determined on a case-by-case basis.

The Decisions are particular matters. As a MTAERS retiree-member, you currently receive a retirement allowance. The threshold question is whether you have a direct and immediate or a reasonably foreseeable financial interest in the outcome of either or both of the MTAERS Board's Decisions. For the reasons discussed below, we conclude that you do. However, based on principles of statutory construction, we further conclude that you will not be precluded from participating in the Decisions.

COLA Acceptance Decision

If the MTAERS Board's vote on the COLA Acceptance Decision is negative, the possibility of your receiving a COLA will be foreclosed; if that vote is positive, you will receive a COLA provided that the MTA Board approves such acceptance and the MTAERS Board thereafter approves an annual COLA. In short, the MTAERS Board's COLA Acceptance Decision is a "make-or-break" decision that would directly and immediately affect your financial interest.^{13/}

Annual COLA Decision

The outcome of each of the MTAERS Board's Annual COLA Decisions would also directly and immediately affect your financial interest as a MTAERS retiree-member receiving a retirement allowance. That is because, the MTAERS Board must either approve PERAC's recommended COLA Adjustment (in which case, your retirement allowance would be increased) or not approve such Adjustment (in which case, your retirement allowance would not be so increased).

Consequently, on its face, §6 would prohibit you from participating, as a MTAERS Board member, in either Decision because of your financial interest therein. However, were we to apply that prohibition literally, without regard for the statutory schemes creating the MTAERS Board, establishing an optional COLA Process and charging the MTAERS Board with the pivotal role in determining whether or not to effect COLAs, we would be barring you from participating as one of the two statutorily prescribed, elected representatives of the approximately 2,000 MTAERS members.

When, as is here the case, G.L. c. 268A prohibits conduct that the Legislature, in another statutory scheme, appears to permit, the two provisions must somehow be reconciled. When attempting to so reconcile such inconsistent provisions, we have looked to principles of statutory construction for guidance. "[W]here two statutes are inconsistent and mutually repugnant, the later statute governs." *Mirageas v. Massachusetts Bay Transportation Authority*, 391 Mass. 815, 819 (1984). Legislation is to be interpreted on the assumption that the Legislature was aware of existing statutes. *Condon v. Haitsma*, 325 Mass. 371, 373 (1950); Sutherland, *Statutory Construction*, § 45.12 (5th Edition). It cannot be presumed that the Legislature would pass a "barren and ineffective statute." *Allen v. City of Cambridge*, 316 Mass. 351, 355 (1944); Sutherland, *Id.*

In *EC-COI-87-42*, we reviewed a statute enacted after, but without any specific reference to, G.L. c. 268A, permitting municipal wiring inspectors to engage in private electrical work in their municipalities, which would ordinarily have been prohibited by G.L. c. 268A, § 17, and concluded that the Legislature intended to permit such employment notwithstanding the applicable provisions of §17. More recently, in *EC-COI-90-15*, we reached a similar conclusion

when reviewing a comparable statute permitting municipal plumbing inspectors to engage in private plumbing work in their municipalities.

In the case before us, the express provisions and plain meaning of G.L. c. 268A prohibiting your participation in the Decisions appear to collide with the plain meaning of the very specific MTAERS Statute and New COLA Statute contemplating that all five MTAERS Board members participate in the Decisions. Neither the MTAERS Statute nor the New COLA Statute contain any specific reference to G.L. c. 268A. Therefore, we will resort to the above-referenced principles of statutory construction to reconcile this collision.

When reviewing the chronology of the enactment of the relevant laws, we observe that G.L. c. 268A, §6, in relevant part, has been in effect since 1963.^{14/} The Legislature, in 1996, expanded the composition of the MTAERS Board and other retirement boards^{15/} and, in 1997, with the enactment of the New COLA Statute, affirmatively shifted to them a pivotal role, at the option of such boards, in effecting COLAs for the members of their respective retirement systems. Given that chronology, we must presume that the Legislature knew that certain retirement board members (in the case before us, at least three) might or would have a personal financial interest in COLAs^{16/} and that the Legislature knew of the restrictions contained in G.L. c. 268A, §6, in effect since 1963. Even without that chronology, we would be guided here by the presumption that, when enacting the MTAERS Statute and the New COLA Statute in 1996 and 1997, respectively, the Legislature did not intend thereby to authorize a futile, barren or meaningless scheme authorizing those three MTAERS Board members to decide matters that they might or would be barred by §6 from deciding. See *Allen* at 355.

Thus, in order to give the New COLA Statute meaning, we conclude that the Legislature must have intended to permit you, despite your financial interest, to participate in the Decisions without violating §6. A contrary result would be unreasonable in these circumstances because we would be determining that, although the Legislature has provided that MTA employee-members or retiree-members of the MTAERS must be elected by the MTAERS members (now approximately 2,000 in number) to two of the five MTAERS Board seats, nevertheless, such individuals could be barred by §6 from participating in some of the very matters that could affect the MTAERS members most directly.

As further support for our conclusion, we note that retirement board members are subject to overriding obligations as fiduciaries who are required to “discharge [their] duties for the exclusive purpose of providing benefits to members and their beneficiaries with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of any enterprise of a like character and with like aims.” See G.L. c. 32, §§1, 23(3).

Our conclusion is also consistent with the view we expressed in *EC-COI-94-1*, involving a member of the State Board of Retirement, who (like you) filled a seat on the Board, as contemplated by statute, to which he was elected as a current employee-member of the State Employees’ Retirement System. We advised the individual that he would be permitted to “participate in particular matters which affect generally the financial interests of members of the retirement system.” *Id.*, n. 4. We further advised him, however, that he would still be prohibited from participating in particular matters, such as a dispute concerning his own retirement benefits, that came before his board.

In sum, we take this occasion formally to restate our advice in *EC-COI-94-1*. You may participate in particular matters that affect generally the financial interest of the members of MTAERS members and their beneficiaries, but you may not participate in particular matters that affect you or your immediate family members uniquely, such as disputes about your or their retirement allowances or other benefits. By so restricting your participation, we are only permitting you to participate to the extent necessary to avert the collision between statutory schemes. In so holding, we are again guided by principles of statutory construction that instruct us: "If reasonably practicable, [a statute] is to be explained in conjunction with other statutes to the end that there may be an harmonious and consistent body of law. . . . Statutes 'alleged to be inconsistent with each other, in whole or in part, must be so construed as to give reasonable effect to both, unless there is some positive repugnancy between them.'" *Walsh v. Commissioners of Civil Serv.*, 300 Mass. 244, 246 (1938), quoting *Brooks v. Fitchburg & Leominster Street Railway*, 200 Mass. 8, 17 (1908).

DATE AUTHORIZED: June 9, 1998

*Pursuant to G.L. c. 268B, §3(g), the requesting person has consented to the publication of this opinion with identifying information.

1/In St. 1996, c. 306, which became effective November 7, 1996, the Legislature revamped Chapter 32 in a number of ways, including increasing from three to five members the number of members of almost all of the 106 public employee retirement boards that are subject to Chapter 32. The MTAERS Board's composition was increased from three to five members by St. 1996, c. 306, §28.

2/Currently, the MTAERS Board has only four members because of a deadlock in selecting the fifth member and because the MTAERS Statute provides no mechanism for appointing the fifth member in such event.

3/MTAERS retirees may elect various options for receiving retirement benefits, including options where they alone receive such benefits and options where they and their beneficiaries receive benefits.

4/Public Employee Retirement Administration Commission (PERAC) personnel provided us information about the history, operation and implementation of the various public employee retirement laws discussed.

5/Under this COLA procedure and its predecessor the MTAERS Board played no role.

6/The retirement systems covered by the New COLA Statute include those for counties, cities and towns and for the MHFA, the MTA, MassPort, the MWRA, the Greater Lawrence Sanitary District, the Blue Hills Regional Vocational School and the Minuteman Regional Vocational Technical School District. The New COLA Statute explicitly excludes from its operation the State Employees' Retirement System and the Teachers' Retirement System.

7/Three MTAERS Board members constitute a quorum.

8/We shall refer to the COLA Acceptance Decision and the Annual COLA Decisions collectively as "Decisions."

9/ “State agency,” any department of a state government including the executive, legislative or judicial, and all councils thereof and thereunder, and any division, board, bureau, commission, institution, tribunal or other instrumentality within such department and any independent state authority, district, commission, instrumentality or agency, but not an agency of a county, city or town. G.L. 268A, §1(p).

10/ “State employee,” a person performing services for or holding an office, position, employment, or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis, including members of the general court and executive council. . . . G.L. c. 268A, § 1(q). We note that you may, in fact, be a “special state employee” to whom certain provisions of the conflict of interest law apply less restrictively; however, nothing in this analysis turns on that classification. See G.L. c. 268A, §1(o)(1).

11/ “Particular matter,” any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

12/ “Participate,” participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).

13/We recognize the possibility that the MTAERS Board might, after having voted not to accept the COLA Process, at some later time have occasion to reconsider the matter, but that does not change this determination.

14/The applicable prohibition contained in the first paragraph of §6 was enacted by St. 1962, c. 779, §1, and has not since been amended.

15/In fact, the Legislature had occasion, as recently as 1997, to review the composition of the MTAERS Board when it again amended the MTAERS Statute to change the member who is to serve ex officio from the MTA’s secretary-treasurer to the MTA’s chief financial officer. See St. 1997, c. 3, §1.

16/By making this observation, we do not intend to conclude that each of those three MTAERS Board members’ financial interest is the same. For example, if any of those three Board members were current MTA employee-MTAERS members whose rights to receive retirement benefits had not yet vested, their personal financial interest might be too remote to implicate §6. By contrast, your financial interest as a MTAERS retiree-member currently receiving a retirement allowance is the sort that would ordinarily implicate §6.